Supreme Court, U.S.
FILED
NOV 22 2002
OFFICE OF THE CLERK

No. 02-275

In the Supreme Court of the United States

FERNANDO RESTREPO, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's offense of failing to appear for a criminal proceeding, in violation of 18 U.S.C. 3146, is an "aggravated felony" under 8 U.S.C. 1101(a)(43)(T).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Hypolite v. *Blackman*, 57 F. Supp. 2d 128 (M.D. Pa. 1999)	6
INS v. *St. Cyr*, 533 U.S. 289 (2001)	4
United States v. *LaBonte*, 520 U.S. 751 (1997)	6, 7
United States v. *Qadeer*, 953 F. Supp. 1570 (S.D. Ga. 1997)	6

Statutes:

8 U.S.C. 1101(a)(43)(T)	2, 3, 5, 6, 7
8 U.S.C. 1227(a)(2)(A)(i)	6
8 U.S.C. 1227(a)(2)(A)(iii)	2
8 U.S.C. 1252(a)(2)(C)	4
18 U.S.C. 3142	5
18 U.S.C. 3146	2, 5, 6, 7
18 U.S.C. 3146(a)	5
18 U.S.C. 3146(b)	2
18 U.S.C. 3146(b)(1)(A)(i)-(iii)	2, 3, 6
18 U.S.C. 3146(b)(1)(A)(iii)	7
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
28 U.S.C. 994(h)	6-7

In the Supreme Court of the United States

No. 02-275

FERNANDO RESTREPO, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2002. The petition for a writ of certiorari was filed on August 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Colombia who became a lawful permanent resident of the United States. Pet. App. 3. In December 1994, petitioner was indicted in the United States District Court for the

Western District of Texas on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. Pet. 2. In September 1997, petitioner was charged in the same court with failing to appear for proceedings on the drug charges in accordance with his conditions of release, in violation of 18 U.S.C. 3146. Pet. App. 6. Later that month, petitioner entered into a plea agreement under which he pleaded guilty to one count of violating 18 U.S.C. 3146. Pet. App. 6.

The statutorily authorized sentence for failing to appear, in violation of 18 U.S.C. 3146, depends on the sentence that could have been imposed in the underlying proceeding that the defendant fled. 18 U.S.C. 3146(b). When the underlying offense is a felony, the maximum prison sentence for the defendant's flight from prosecution ranges from two years to life. 18 U.S.C. 3146(b)(1)(A)(i)-(iii). Petitioner was sentenced to 12 months and one day in prison, three years' supervised release, and a $1000 fine. Pet. App. 6.

2. In March 1998, the Immigration and Naturalization Service (INS) charged petitioner with being removable from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) for having committed an "aggravated felony." Pet. App. 3-4. In particular, the INS charged that petitioner's failure-to-appear offense is an "aggravated felony" under 8 U.S.C. 1101(a)(43)(T). That provision defines the term "aggravated felony," for purposes of the immigration laws, to include "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." 8 U.S.C. 1101(a)(43)(T).

During his removal proceeding before an immigration judge (IJ), petitioner argued that his failure-to-appear conviction is not an aggravated felony under Section 1101(a)(43)(T) because the Sentencing Guidelines range for his crime—taking account of the base offense level, the nature of the underlying drug offenses, and petitioner's criminal history and acceptance of responsibility—was 12 to 18 months. See Pet. App. 4-5; Pet. 12. Because the Guidelines range in his particular case was less than two years, petitioner argued, his failure-to-appear conviction was not "an offense * * * for which a sentence of 2 years' imprisonment or more may be imposed." 8 U.S.C. 1101(a)(43)(T); see Pet. App. 4-5.

The IJ rejected petitioner's argument. He determined (Pet. App. 7) that the drug charges for which petitioner failed to appear were felony charges, meaning that petitioner was statutorily eligible to be sentenced to a term of at least two years' imprisonment for failing to appear. See 18 U.S.C. 3146(b)(1)(A)(i)-(iii). The IJ concluded (Pet. App. 7) that the reference to "a sentence of 2 years' imprisonment or more" in the "aggravated felony" definition of Section 1101(a)(43)(T) is a reference to the statutorily provided penalty for failing to appear, and not to the Guidelines range for the failure-to-appear offense. Nor, the IJ held (*id.* at 7-8), does the two-year-sentence requirement refer to the sentence that could have been imposed on the original charge for which the alien failed to appear.[1] The IJ

---

[1] In the alternative, the IJ concluded (Pet. App. 8) that Section 1101(a)(43)(T) would apply to petitioner's failure-to-appear conviction even if the relevant question were whether petitioner's drug charges (as opposed to his failure-to-appear conviction) are offenses "for which a sentence of 2 years' imprisonment or more

therefore determined that respondent is removable from the United States. *Id.* at 8.

The Board of Immigration Appeals affirmed the IJ's decision in a per curiam order. Pet. App. 2.

3. Petitioner sought review of his final order of removal in the United States Court of Appeals for the Fifth Circuit. The government moved to dismiss the petition for review, arguing that 8 U.S.C. 1252(a)(2)(C) bars direct appellate review in petitioner's case. Section 1252(a)(2)(C) provides in pertinent part that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a[n aggravated felony] covered in section * * * 1227(a)(2)(A)(iii) * * * of this title." 8 U.S.C. 1252(a)(2)(C); see generally *INS* v. *St. Cyr*, 533 U.S. 289, 312-313 (2001) (discussing Section 1252(a)(2)(C) and determining that habeas corpus review of removal orders remains available). The court granted the government's motion and dismissed the petition for lack of jurisdiction. Pet. App. 1.

ARGUMENT

Petitioner does not dispute that, if his failure-to-appear offense is an aggravated felony, then the court of appeals correctly applied 8 U.S.C. 1252(a)(2)(C) when dismissing his petition for review. The immigration judge's determination that petitioner's failure-to-appear offense is an aggravated felony, which the Board of Immigration Appeals (BIA) expressly upheld and the court of appeals implicitly approved in its unpublished order, is correct and does not conflict with any decision

---

may be imposed," because petitioner could have been sentenced to two years or more on either of the underlying drug charges.

of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioner's lead argument (Pet. 6-7) is that the "aggravated felony" definition of Section 1101(a)(43)(T) is not satisfied here because the government did not establish in petitioner's removal proceeding that he was required to appear in the cocaine-distribution case "pursuant to a court order to answer to or dispose of a charge." 8 U.S.C. 1101(a)(43)(T). That claim is entirely fact-bound. It was not expressly addressed by the IJ (see Pet. App. 6-7), and was not mentioned by the BIA (*id.* at 2) or the court of appeals (*id.* at 1).

Furthermore, petitioner's argument lacks merit. Petitioner was convicted of failing to appear in court as required by conditions of release imposed under Chapter 207 of Title 18. See 18 U.S.C. 3146(a). The provision of Chapter 207 that governs conditions of pretrial release specifically provides for their imposition by a judicial order. See 18 U.S.C. 3142. In addition, the administrative record on which the IJ made his decision contains the criminal information dated September 5, 1997, that charged petitioner with failing to appear, in violation of 18 U.S.C. 3146. A.R. 100. The information states that petitioner "knowingly fail[ed] to appear before a court as required by the conditions of release" issued under Chapter 207, thus further demonstrating satisfaction of the "court order" element of Section 1101(a)(43)(T).

2. Petitioner also contends (Pet. 10-17, 19-21) that Section 1101(a)(43)(T)'s description of failure-to-appear offenses "for which a sentence of 2 years' imprisonment or more may be imposed," refers to the particular defendant's sentencing range under the Sentencing Guidelines, not the penalty that is statutorily author-

ized for the failure-to-appear offense.[2] Petitioner is unable to cite any decision by any court, much less another court of appeals, that adopts his suggested reading of Section 1101(a)(43)(T).

Of the two district court cases that petitioner cites as his authority, one addresses a different provision of the immigration laws, see *United States* v. *Qadeer*, 953 F. Supp. 1570, 1580 (S.D. Ga. 1997) (discussing language now codified at 8 U.S.C. 1227(a)(2)(A)(i)), and the other interprets the word "felony" as used in the criminal laws, see *Hypolite* v. *Blackman*, 57 F. Supp. 2d 128, 138 (M.D. Pa. 1999). In both of the cited cases, moreover, the district court determined that the upper end of the applicable Guidelines range triggered statutory consequences in a later proceeding. See 953 F. Supp. at 1580 (Guidelines range of six to 12 months demonstrates that defendant "could have been sentenced to a one year term of imprisonment"); 57 F. Supp. 2d at 138 (Guidelines range of 57 to 71 months shows that crime was punishable as a felony). By contrast, the fact that the Sentencing Guidelines provided, in petitioner's case, for a sentencing range *below* the two-year term specified in Section 1101(a)(43)(T) does not suggest that the statutory *maximum* sentence for petitioner's violation of 18 U.S.C. 3146 is less than the two-year benchmark. In fact, the statutory maximum sentence in petitioner's case was at least two years. See 18 U.S.C. 3146(b)(1)(A)(i)-(iii).[3]

---

[2] In this Court petitioner does not pursue the argument, rejected by the IJ (see Pet. App. 7-8), that the two-year sentence requirement applies to the charges that were pending when the defendant fled prosecution, rather than the failure-to-appear offense. See Pet. 8-9.

[3] In *United States* v. *LaBonte*, 520 U.S. 751 (1997), this Court held that the phrase "maximum term authorized," as used in 28

Petitioner answers his own argument (Pet. 15-16) that the two-year limitation in Section 1101(a)(43)(T) would be surplusage unless Congress intended to refer to the Sentencing Guidelines, because a two-year sentence is statutorily authorized whenever a defendant violates Section 3146 by failing to appear for a felony proceeding. See 18 U.S.C. 3146(b)(1)(A)(iii). As the IJ noted (Pet. App. 7), and as petitioner recognizes (Pet. 16), Section 1101(a)(43)(T) reaches failure-to-appear offenses from state and foreign jurisdictions, in addition to violations of 18 U.S.C. 3146.

Moreover, petitioner's proposed rule would add to the complexity of applying Section 1101(a)(43)(T) in many cases. For example, petitioner does not explain why it would not be necessary, under his theory, for a court applying Section 1101(a)(43)(T) to assess the likelihood and significance of an upward departure from the Guidelines range in the alien's particular failure-to-appear case. See Pet. 11 (acknowledging possibility of upward departure).

U.S.C. 994(h), plainly "refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes." 520 U.S. at 758.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

NOVEMBER 2002